

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CORDARRELL ISIAH SIMS,

Defendant-Appellant.

UNPUBLISHED

February 15, 2011

No. 292529

Macomb Circuit Court

LC No. 2008-000791-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his sentences for his plea-based convictions of first-degree home invasion, MCL 750.110a(2), conspiracy to commit first-degree home invasion, MCL 750.157a and MCL 750.110a(2), and assault with intent to do great bodily harm less than murder, MCL 750.84. On appeal, defendant raises several issues related to his sentencing, including the scoring of four of the offense variables (OV) and the proportionality of his sentence. The trial court initially sentenced defendant to prison terms of 140 to 240 months each for the home invasion and conspiracy convictions, and 67 to 120 months for the assault conviction. The trial court subsequently amended the judgment of sentence for the home invasion sentence to be served consecutively to the remaining two concurrent sentences. We affirm defendant's convictions, but remand for correction of the judgment of sentence as set forth in this opinion.

I.

At a plea hearing, defendant admitted that he conspired with a codefendant and committed a breaking and entering of a dwelling with the intent to commit a larceny therein, in the course of which he physically struck an occupant with a baton with the intent to cause great bodily harm. Defendant's presentence investigation report ("PSIR"), which was based on a police report, provides greater detail:

On 1/14/08, the defendant ... and co-defendant ... kicked open the locked door to the residence The home belonged to victim Stacey Gilbert and her four special needs children ages 2-14. Co-defendant ... entered the home with a gun pointed at victim Gilbert and her children and stated, "B _ _ _ [sic], give me the money and get on the ground." Victim Gilbert stated that she did not have any money. She stated that co-defendant ... again stated, "Where the

money, b _ _ _ _[?]" She then noticed another male (defendant . . .) coming in from the laundry room holding something black. Victim Gilbert stated she feared for her children's lives because co-defendant . . . pointed the gun at the children and walked toward them. She pushed the co-defendant and they both fell over her son's high chair. Victim Gilbert stated that defendant . . . had a metal object, possibly a flashlight, and he began hitting her on the head about eight times before she blacked out. Co-defendant . . . stopped defendant . . . from beating victim Gilbert any further.

* * *

[The codefendant told the police] that [defendant] asked him to help rob the victim because he was in the victim's home before and had seen a stack of money that the victim had been saving. [The codefendant] agreed and they made plans on robbing the victim with [defendant] giving him a layout of the home because he had been there before. . . . [The codefendant] stated that they watched the victim's husband leave the residence. [The codefendant] and [defendant] ran up to the door [and defendant] kicked in the door. [The codefendant] ran into the house and pointed a gun at the victim and said, "Give me the money, B _ _ _ _ and get on the ground." [The codefendant] stated that the kids started screaming and the victim ran at him and tried to grab him. [The codefendant] stated that he started to run out the door when [defendant] came running up to the victim and opened his metal police baton and began beating her. [The codefendant] stated that the victim was lying on the ground not moving with [defendant] still hitting her viciously on the head. . . .

This Court granted defendant's delayed application for leave to appeal. *People v Sims*, unpublished order of the Court of Appeals, entered July 8, 2009 (Docket No. 292529).

II.

On appeal, defendant challenges the scoring of OV 9, 10, 12, and 13, under the sentencing guidelines for the home invasion conviction. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). To the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

A. OV 9

OV 9 concerns the number of victims. The trial court assessed ten points, which is the total prescribed where "[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss." MCL 777.39(1)(c).

At sentencing, defense counsel protested that Gilbert's children should not be included in the scoring of OV 9. However, the trial court noted that the children had showed great signs of psychological stress in the matter, and counsel agreed they were "psychologically traumatized." Even if it was error to rely on a mental or emotional injury where OV 9 specifically refers to

“physical injury or death,” at a post-trial motion hearing to correct the judgment of sentence, the trial court stated:

the complaining witness claimed that she feared for her children’s lives because [the codefendant] pointed the gun at the children and walked towards them. So the . . . children . . . if they had a gun pointed at them, you know, obviously later on . . . it’s been determined it was a BB gun, but nevertheless it would certainly put those kids in danger.

The court added that the children were present while defendant was “swinging the baton around.”

Defendant now complains that the trial court relied on the agent’s description of the offense in the PSIR, but a sentencing court may rely on information and sources that would not be admissible at trial. MCR 1101(b)(3); *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). Defendant further notes that codefendant’s gun was a BB gun, and argues that such weaponry could not place a person “in danger of physical injury.” MCL 777.39(1)(c). Defendant fails to cite any authority for the proposition that a BB gun cannot place a person in danger of physical injury, and under the circumstances, we cannot conclude that the trial court erred in finding that the BB gun placed Gilbert’s children in danger. In any event, the children were also present during defendant’s uncontrolled, violent and repeated striking of Gilbert, which also placed the children in danger. For these reasons, the trial court did not err in scoring ten points for OV 9.

B. OV 10

OV 10 concerns victim vulnerability. The trial court assessed five points for OV 10, which is the total prescribed where the offender “exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). To “exploit” is to “to manipulate a victim for selfish or unethical purposes.” MCL 777.40(3)(b). Subsection 40(2) provides, “The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.”

Defendant argues that the victims “were targeted because they were thought to have money, not because they could be ‘manipulated.’” However, a scoring decision will not be reversed if any evidence exists to support the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). In this case, that defendant had physical size and strength advantages over all the victims, is not in dispute. The evidence that defendant waited until Gilbert’s husband had left the premises, then victimized Gilbert and her children—specifically beating Gilbert with a blunt object, justifies the conclusion that defendant exploited his physical advantages over all the victims. Because the victim’s physical disadvantages were not merely incidental to this

offense, the trial court did not err in scoring five points for OV 10.¹

C. OV 12

OV 12 concerns contemporaneous felonious criminal acts. MCL 777.42(1). The trial court assessed 25 points for OV 12, which is what the statute prescribes where, in addition to the sentencing offense, “[t]hree or more contemporaneous felonious criminal acts involving crimes against a person were committed.” MCL 777.42(1)(a). A felonious criminal act is contemporaneous if “[t]he act occurred within 24 hours of the sentencing offense” and “[t]he act has not and will not result in a separate conviction.” MCL 777.42(2)(a).

Pursuant to defendant’s plea agreement, four charges of felonious assault, which were based on the threats against Gilbert’s four children, were dismissed. MCL 750.82(1) provides,

Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.

Defendant argues that a BB gun cannot satisfy the dangerous weapon element of felonious assault. However, this argument is unpersuasive because the Legislature’s use of the word “gun” is broad, and does not require a gun to be a firearm, as opposed to the air gun in this case. Furthermore, as we concluded earlier in the opinion, the trial court did not err in finding that the BB gun placed Gilbert’s children in danger. Therefore, the trial court did not err in scoring 25 points for OV 12.

D. OV 13

OV 13 concerns patterns of felonious conduct. The trial court assessed 25 points for OV 13, which is the total prescribed where the offense is “part of a pattern of felonious criminal activity involving 3 or more crimes against a person.” MCL 777.43(1)(c). The statute provides that “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.” MCL 777.43(2)(a). The statute further provides that “[e]xcept for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.” MCL 777.43(2)(c).

At the post-trial motion hearing to correct the judgment of sentence, the trial court noted that the incident involving Gilbert and her children initially engendered seven charges. The trial court properly found that the concurrent charges that did not result in a conviction, specifically the four charges of felonious assault, were accounted for in the scoring of OV 12 and could not be reserved for consideration in scoring of OV 13. MCL 777.43(2)(c); *People v Bemer*, 286

¹ The prosecutor argues that the trial court should have assessed ten points for OV 10. However, the prosecutor’s failure to file a cross appeal precludes review of this argument. MCR 7.207; see also *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).

Mich App 26, 28; 777 NW2d 464 (2009). However, the prosecutor concedes that the trial court erred by considering other misdemeanor act or felonious criminal activity outside of the five-year period.

Thus, the key question on appeal with respect to OV 13 is whether the remaining concurrent convictions—first-degree home invasion, conspiracy to commit first-degree home invasion, and assault with intent to do great bodily harm less than murder—constituted a pattern of felonious criminal activity involving three or more crimes against a person. Three or more concurrent offenses against a person are sufficient for purposes of scoring OV 13 at 25 points. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001). First-degree home invasion and assault with intent to do great bodily harm less than murder constitute crimes against a person. MCL 777.16d and MCL 777.16f. As defendant argues, however, MCL 777.18 provides that conspiracy is a crime against public safety.

The prosecutor counters that the underlying offense, first-degree home invasion, is a crime against a person, so conspiracy should qualify as a crime against a person for purposes of scoring OV 13. The prosecutor cites an instruction to the Michigan Sentencing Guidelines Manual, which provides in pertinent part:

Special scoring instructions apply to offenses listed in MCL 777.18 (e.g., conspiracy . . .). Offenses in MCL 777.18 are guidelines offenses predicated on the offender's commission of an underlying offense. Each offense is given a crime group designation for purposes of MCL 777.18 and that crime group designation may differ from the crime group designation of the offense on which the MCL 777.18 conviction is based. In such cases, OVs for both crime group designations must be scored. [Michigan Sentencing Guidelines Manual (Thomson West, 2008).]

The prosecutor's reliance on this instruction is misplaced. The fact, that OVs for both crime group designations must be scored where the crime group designation for purposes of MCL 777.18 differs from that of the offense on which the MCL 777.18 conviction is based, is inapposite as to the question whether a particular offense category remains constant despite the existence of an underlying offense. Had the Legislature intended the offense category for conspiracy to vary based on the underlying offense, the Legislature would have given conspiracy a "variable" offense category designation like violations of MCL 752.797(3), instead of the "crime against public safety" offense category. MCL 777.17c(2) ("For a violation of section 797(3) of 1979 PA 53, MCL 752.797, determine the offense category, offense variable level, and prior record variable level based on the underlying offense.").

Because we conclude that conspiracy is a crime against public safety and only two of the three concurrent convictions constituted crimes against a person, the trial court erred when it assessed 25 points for OV 13. According to the SIR, defendant received a total offense variable score of 112 points, placing him in the highest OV level (Level VI) of the applicable sentencing grid, MCL 777.63. Rescoring OV 13 at zero points, and thus reducing the total offense variable score by 25 points, would leave defendant with a total offense variable score of 87 points, which would still place him in OV Level VI (75+ points). However, although the erroneous scoring of OV 13 would not affect the appropriate guidelines range, our Supreme Court has held that a defendant must be sentenced according to accurately scored guidelines and in reliance on

accurate information, *People v Jackson*, 487 Mich 783, 794; ___ NW2d ___ (2010), and that “a sentence is invalid if it is based on inaccurate information.” *Id*, citing *People v. Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Thus, pursuant to *Jackson*, we remand for resentencing.²

E. Proportionality

Defendant’s last argument on appeal is that the trial court’s decision to impose sentences with minimums at the high end of the guidelines range for first-degree home invasion and conspiracy, combined with the order for the sentences to be served consecutively, produced a result disproportionate to the offense and the offender. Because we remand for resentencing, we decline to address this issue.

We remand this case for resentencing in accordance with *People v Jackson*, 487 Mich 783, 794; ___ NW2d ___ (2010), and affirm in all other respects. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Deborah A. Servitto

² The trial court also completed an SIR for defendant’s assault with intent to do great bodily harm conviction, presumably because consecutive sentences were imposed. In his brief on appeal, defendant does not refer to this separate SIR, for which the trial court also scored 25 points for OV 13. For that offense, defendant received a total OV score of 110 points, placing him in OV Level VI of the applicable sentencing grid for that offense, MCL 777.65. As with the SIR for the home invasion conviction, a 25-point reduction in the scoring of the SIR for the assault conviction would not affect defendant’s placement in OV Level VI (75+ points), but pursuant to *People v Jackson*, we, nevertheless, remand for resentencing.